United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

No. 76-4088

United States Court of Appeals

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

ST LUKE'S HOSPITAL CENTER AND DISTRICT 1199, NATIONAL UNION OF HOSPITAL AND HEALTH CARE EMPLOYEES, A DIVISION OF RWDSU, AFL-CIO,
Respondents.

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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INDEX

	Page
STATEMENT OF ISSUE PRESENTED	1
STATEMENT OF THE CASE	2
I. The Board's findings of fact	2
A. The New York State Labor Relations Board certifies District 1199 as the bargaining representative in a technical and professional unit including dieticians; the Hospital and District 1199 enter into a collective bargaining agreement	2
B. District 1199 and the Hospital attempt to enforce the union security provision of their collective bargaining agreement against the dieticians	5
II. The Board's Decision and Order	6
ARGUMENT	7
The Board properly found that the Hospital violated Section 8(a)(3) and (1) and District 1199 violated Section 8(b)(2) and (1)(A) of the Act by attempting to enforce the Union Security provisions of their collective bargaining agreement against the Hospital's dieticians	7
CONCLUSION	15

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Bakery & Confectionary Workers' Int'l Union of America, Chocolate Workers No. 464, 208 NLRB 452 (1974), enf'd 506 F.2d 1052 (C.A. 3, 1974)	14
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Page

Carey v. Westinghouse,
375 U.S. 261 (1964) 14

Combustion Engineering, Inc.,
195 NLRB 909 (1972) 14

Cornell University,
183 NLRB 329 (1970) 10

Germantown Development Co., Inc.,
207 NLRB 586 (1973) 14

Leedom v. Kyne,
358 U.S. 184 (1958) 9

Getreu v. Bartenders & Hotel & Restaurant Employees Union Local 158,
181 F. Supp. 738 (N.D. Ind., 1960) 10

Intalco Aluminum Corp. v. N.L.R.B.,
417 F.2d 36 (C.A. 9, 1969) 10

Melbet Jewelry Co.,
180 NLRB 107 (1969) 9

Mental Health Center of Boulder Community, Inc.,
222 NLRB No. 146 (1975),
91 LRRM 1326 11

Mercy Memorial Hospital Corp.,
221 NLRB No. 1,
90 LRRM 1611 (1975) 10

N.L.R.B. v. Food Emp. Council, Inc.,
399 F.2d 501 (C.A. 9, 1968) 9

N.L.R.B. v. Horn & Hardart Co.,
439 F.2d 674 (C.A. 2, 1971) 14

N.L.R.B. v. Masters-Lake Success, Inc.,
287 F.2d 35 (C.A. 2, 1961) 9

Page

N.L.R.B. v. Western Meat Packers, Inc.,
350 F.2d 804 (C.A. 10, 1965) 10

Retail Clerks Local Union No. 324, etc.,
144 NLRB 1247 (1963) 9, 11

Sheraton-Kauai Corp. v. N.L.R.B.,
429 F.2d 1352 (C.A. 9, 1970) 14

St. Joseph's Hospital,
221 NLRB No. 213,
91 LRRM 1074 (1975) 10

Statutes:

National Labor Relations Act, as amended (61 Stat. 136,
73 Stat. 519, 88 Stat. 395, 29 U.S.C., Sec. 151, *et seq.*) 2, 5

Section 2(12) 3
Section 7 . . . . . 7, 14
Section 8(a)(1) 1, 6, 7, 8
Section 8(a)(3) 1, 6, 7, 8, 9, 13
Section 8(b)(1)(A) 1, 6, 7, 8
Section 8(b)(2) 1, 6, 7, 8, 9
Section 9 14
Section 9(a) 9, 13
Section 9(b) 14
Section 9(b)(1) 7, 8, 9, 11, 13
Section 10(e) 2

Postal Reorganization Act, Public Law 91-375 (84 Stat. 719,
39 U.S.C., Sec. 101, 1203(b)) 12

Section 2(14) 5

Miscellaneous:

120 Cong. Rec. 6393 (Daily Edition, July 11, 1974) 12, 13
I Leg Hist. 417, Labor Management Relations Act of 1947, p. 417 . . . 9
S. Rept. 105, 80th Cong., 1st Sess. 11 9

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ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF ISSUE PRESENTED

Whether the Board properly found that the Hospital violated Section 8(a)(3) and (1) and District 1199 violated Section 8(b)(2) and (1)(A) of the Act by attempting to enforce the union security provision of their collective bargaining agreement against professional employees who were included in the bargaining unit pursuant to state representation proceedings in which they were denied the right to a self-determination election.

STATEMENT OF THE CASE

This case is before the Court upon the application of the National Labor Relations Board pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et seq.*), for enforcement of the Board's order issued on January 2, 1976, against St. Luke's Hospital Center (herein "the Hospital"), and District 1199, National Union of Hospital and Health Care Employees, A Division of RWDSU, AFL-CIO (herein, "District 1199"). The Board's Decision and Order (A.11)[1] are reported at 221 NLRB No. 217. This Court has jurisdiction over the proceedings, the unfair labor practices having occurred at New York, New York, where the Hospital is engaged in providing health services.

I. THE BOARD'S FINDINGS OF FACT

A. The New York State Labor Relations Board certifies District 1199 as the bargaining representative in a technical and professional unit including dieticians; the Hospital and District 1199 enter into a collective bargaining agreement

On April 16, 1973, District 1199 filed a petition with the New York State Labor Relations Board ("NYSLRB") seeking an election in a unit composed of the Hospital's professional and technical employees (A. 11, 5; 117-118). On May 1, 1973, a group known as the Professional Dietician Employees of St. Luke's Hospital Center (herein, the "Dieticians'

[1] "A." references are to the printed Appendix. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

Association") filed a petition with the NYSLRB seeking an election in a separate unit composed of the Hospital's dieticians (A. 12, 5; 53, 117-118).[2] On May 8, 1973, the Hospital, District 1199, and the Dieticians' Association entered into a consent agreement, subject to the approval of the NYSLRB, for an election which would provide the dieticians with an opportunity to vote on (1) whether or not they wished to be represented in a separate bargaining unit; (2) whether, if there were a separate dieticians' unit, they wished to be represented by the Dieticians' Association; and (3) whether, if they were included in an overall technical and professional unit, they wished to be represented by District 1199 (A. 12, 5; 55-59).

On May 24, 1973, the NYSLRB issued its Memorandum and Direction of Election in which it rejected the consent agreement and directed an election in the unit initially petitioned for by District 1199 consisting of technical and professional employees. In view of the pending petitions filed by the Dieticians' Association and other organizations seeking separate representation of various groups of alleged professional employees,[3] the NYSLRB ordered that the ballots of the alleged professionals be challenged pending post-election proceedings which would determine whether they were entitled to vote, in a separate self-determination election, as professional employees, or whether they could be properly included in the overall unit, petitioned for by District 1199, without a

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[2] It is undisputed that the dieticians are professional employees within the meaning of Section 2(12) of the National Labor Relations Act (A. 11, n. 2, 5; 119, 138-139, 140-141, 99-101).

[3] Other organizations filed petitions seeking separate units of pharmacists and pharmacist-interns and dental hygienists (A. 13, n. 3, 6; 61, n. 2).

separate vote (A. 12, 6; 60-62). On June 7, 1973, an election was conducted which District 1199 won by 151 to 61, with 71 ballots challenged (A. 12, 6; 65, 122-124). On June 21, 1973, the NYSLRB issued a Certification of Representative, certifying District 1199 as the representative of the Hospital's technical and professional employees but excluding from the unit those classifications of employees, including dieticians, for whom separate petitions had been filed (A. 12, 6-7; 68-69). On August 1, 1973, the Hospital and District 1199 executed a collective bargaining agreement covering the employees in the certified unit (A. 12, 7; 69-70).

On May 22, 1974, the NYSLRB issued its Decision, Order and Amended Certification of Representative, in which it held that under the New York statute, the right of professional employees to vote for separate representation depends upon whether a "labor organization" seeks to represent them in a separate unit. The NYSLRB found that the Dieticians' Association was not a "labor organization" under the New York statute and that consequently, even if the dieticians were professionals, a question it left unresolved, no basis for a separate vote existed. Accordingly, the NYSLRB dismissed the petition filed by the Dieticians' Association and amended its previous certification of District 1199 to include the dieticians in the bargaining unit. The challenged ballots of professional employees including dieticians were never counted as there were not enough challenged ballots to affect the outcome of the election (A. 12-13, 13, n. 4, 7; 74, 75, 76, n. 3, 77-87).[4]

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[4] A similar finding was made regarding the organizations seeking separate representation of the pharmacists and pharmacist-interns and the dental hygienists (*Id.*).

On July 26, 1974, the Hospital and District 1199 amended their collective bargaining agreement to cover the dieticians (A. 13, 7; 88-95, 131-133). This was the same day that the President signed into law the health care amendments which were to become effective 30 days from that date (A. 13).

B. District 1199 and the Hospital attempt to enforce the union security provision of their collective bargaining agreement against the dieticians

On August 25, 1974, the 1974 amendments to the National Labor Relations Act extending the National Labor Relations Board's jurisdiction to include non-profit health care institutions such as the Hospital became effective.[5]

On October 16, 1974, District 1199 informed the Hospital that a number of dieticians had failed to comply with the union security provisions of the collective bargaining agreement and insisted that the Hospital enforce such compliance (A. 13, 7; 96).[6] On October 18, the Hospital notified the dieticians that they were required to become members of District 1199 within a stated period of time or terminate their employment (A. 13, 7; 97, 143). On March 25, 1975, the Union wrote the Company demanding the discharge of the dieticians for failure to comply

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[5] Public Law 93-360, 93rd Congress, S. 3203, 88 Stat. 395, Section 2(14).

[6] All other employees in the unit covered by the agreement have complied (A. 13; 152).

with the union security provisions (A. 13, 8; 98). Thereafter, the matter was referred to arbitration at District 1199's request and on May 17, 1975, the arbitrator issued an Opinion and Order finding the union security agreement "lawful and entitled to enforcement" but withholding a final award pending disposition of unfair labor practice charges by the Board (A. 8; 103, 111-112).[7]

II. THE BOARD'S DECISION AND ORDER

On the basis of the foregoing facts, the Board, reversing the Administrative Law Judge, found that the Hospital violated Section 8(a)(3) and (1) and District 1199 violated Section 8(b)(2) and (1)(A) of the Act by attempting to enforce the union security provision of their collective bargaining agreement against the dieticians by the use of threats by the Hospital to discharge the dieticians and attempts by District 1199 to cause the Hospital to discharge them (A. 16-17). In so finding, the Board noted that union security agreements are valid and enforceable under the proviso to Section 8(a)(3) of the National Labor Relations Act, only where the union is the representative of the employees in the appropriate unit covered by the agreement when made. The Board held that the unit certified by the NYSLRB here was inappropriate because the inclusion of the dieticians in a unit with non-professionals, without affording them an

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[7] Pursuant to unfair labor practice charges filed by the Dieticians' Association, the General Counsel had issued a complaint on May 8, 1975, alleging that the Hospital and District 1199 violated Section 8(a)(3) and (1) and 8(b)(2) and 1(A) by attempting to enforce the union security provisions of their collective bargaining agreement against the dieticians (A. 2-3; 32, 24, 26, 28, 30).

opportunity to vote for separate representation was repugnant to Section 9(b)(1) of the National Labor Relations Act (A. 13-16).

The Board's order requires the Hospital and District 1199 to cease and desist from the unfair labor practices found, from maintaining or enforcing, or attempting to maintain or enforce, the union security provision of their collective bargaining agreement with respect to the Hospital's dieticians, who have refused to comply with the provision, and from in any other manner interfering with, restraining or coercing the dieticians in the exercise of their Section 7 and 9(b)(1) rights (A. 17-18, 19-20). Affirmatively, the order requires the Hospital and District 1199 to withdraw, rescind, and give no further effect to any notice, memorandum, letter, or statement which can be reasonably construed as maintaining or enforcing, or attempting to maintain or enforce, the union security clause with respect to the dieticians, who have refused to comply therewith (A. 18, 19). Finally, the order requires the Hospital and District 1199 to post appropriate notices (A. 18, 19-20).

ARGUMENT

THE BOARD PROPERLY FOUND THAT THE HOSPITAL VIOLATED SECTION 8(a)(3) AND (1) AND DISTRICT 1199 VIOLATED SECTION 8(b)(2) AND (1)(A) OF THE ACT BY ATTEMPTING TO ENFORCE THE UNION SECURITY PROVISIONS OF THEIR COLLECTIVE BARGAINING AGREEMENT AGAINST THE HOSPITAL'S DIETICIANS

As shown *supra*, pp. 5-6, it was after the effective date of the health care amendments conferring on the Board jurisdiction over private non-profit health care institutions, that District 1199 and the Hospital

attempted to enforce the union security provisions of their collective bargaining agreement against professional employee dieticians, who were placed in a bargaining unit with non-professional employees, without being accorded a self-determination election as required by Section 9(b)(1) of the Act. We show below that the Board acted properly in concluding that these efforts to enforce the union security clause by District 1199 and the Hospital violated Sections 8(b)(2) and (1)(A) and Sections 8(a)(3) and (1) of the Act respectively. We further show that in reaching this conclusion the Board properly determined that this enforcement of the union security provision was not saved from liability by the fact that the unit of professional and non-professional employees resulted from a state board proceeding completed shortly before the effective date of the amendments.

The Act clearly prohibits enforcement of a union security agreement against professional employees who have been included in a unit with non-professionals, without affording them a separate self-determination election. Section 8(b)(2) and 8(a)(3) of the Act make it unlawful for a union or an employer to cause or attempt to cause the discharge of employees in order to encourage or discourage union membership, absent the existence of a valid contract between the union and the employer containing a union security provision meeting the requirements of the proviso to Section 8(a)(3). Subsection (i) of this proviso permits a union security clause only where the union is the majority representative of the employees "in the appropriate bargaining unit covered by such agreement

when made".[8] See *Retail Clerks Local Union No. 324, Retail Clerks International Association, AFL-CIO (Vincent Drugs No. 3, Inc.)*, 144 NLRB 1247, 1248-1250 (1963); *Melbet Jewelry*, 180 NLRB 107, 110 (1969); *N.L.R.B. v. Masters-Lake Success, Inc.*, 287 F.2d 35, 36 (C.A. 2, 1961); *N.L.R.B. v. Food Employers Council, Inc.*, 399 F.2d, 501, 502 (C.A. 9, 1968). Section 9(b)(1) provides that the Board may not find a bargaining unit appropriate ". . . if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit." See, *Leedom v. Kyne*, 358 U.S. 184, 188-189 (1958).[9] It is clear, then, that the foregoing provisions of the Act make it unlawful for a union or employer to enforce a union security clause against professional employees who have been placed in a unit with non-professionals without their consent.

In the instant case the Board refused to extend comity to the NYSLRB unit determination because it was repugnant to Section 9(b)(1) of the Act. The Board's finding is consistent with its well-established policy to recognize the results of state agency proceedings and accord

[8] Section 8(b)(2) of the Act provides, in relevant part, that it is an unfair labor practice for "a labor organization or its agents . . . to cause an employer to discriminate against an employee in violation of [Section 8(a)(3) of the Act] . . ." Section 8(a)(3), in turn, forbids employer "discrimination in regard to hire or tenure of employment . . . to encourage or discourage membership in any labor organization . . ."

The proviso to Section 8(a)(3) provides in pertinent part:

> That nothing in this Act . . . shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment . . . (1) if such labor organization is the representative of the employees as provided in Section 9(a), in the appropriate bargaining unit covered by such agreement when made . . .

[9] The mandate established by Congress in enacting Section 9(b)(1) was that recognition be accorded to the "special problems" of professional persons who "have a great community of interest in maintaining certain standards." S. Rept. 105, 80th Cong., 1st Sess. 11; I Leg Hist. 417, Labor Management Relations Act of 1947, p. 417.

them the effect of Board-conducted proceedings only where the state proceedings, including unit determinations, comport with due process requirements and are not contrary to the mandates of the National Labor Relations Act. See *St. Joseph's Hospital,* 221 NLRB No. 213, 91 LRRM 1074 (1975); *Mercy Memorial Hospital Corporation,* 221 NLRB No. 1, 90 LRRM 1611, 1613 (1975); *Cornell University,* 183 NLRB 329, 334 (1970).[10] In explaining its denial of comity to the state unit determination in the instant case, the Board stated:

> The circumstances attending the certification of these dieticians are unusual, if not irregular. Though the ballots were impounded, they were ultimately not counted because under State law separate representation required a bargaining agent that qualified as a labor organization in the State. The St. Luke's Professional Dieticians was found not to qualify. The State Board's failure to proceed to a tally of the challenged votes of dieticians and certify only if a majority had voted to be represented in a unit including nonprofessionals was repugnant to Section 9(b)(1) of the Act we administer.

These findings are amply supported by the record evidence (*supra,* pp. 2-4) and are consistent with post-amendment comity cases in which the Board has repeatedly held that a state-determined unit which combines professionals with non-professionals without the opportunity for a self-determination election is ". . . a unit which is, on its face, at variance with the policies enunciated by Congress in the National Labor Relations Act" and, therefore, not entitled to comity from the Board. *Brookhaven Memorial Hospital,* 214 NLRB No. 159, 87 LRRM 1428, 1430 (1974).

[10] This policy has been consistently recognized and approved by the courts. See *N.L.R.B. v. Western Meat Packers, Inc.,* 350 F.2d 804, 805 (C.A. 10, 1965); *Intalco Aluminum Corp. v. N.L.R.B.,* 417 F.2d 36-40 (C.A. 9, 1969); *Getreu v. Bartenders and Hotel and Restaurant Employees Union, Local 158,* 181 F. Supp. 738, 741 (N.D. Ind. 1960).

Accord: *Mental Health Center of Boulder County, Inc.*, 222 NLRB No. 146, Sl. op. p. 4 (1975).[11]

Faced with a situation where the NYSLRB unit determination was repugnant to Section 9(b)(1) of the Act, the Board properly rejected District 1199's contention that it should nevertheless consider it binding merely because the final state certification issued prior to the effective date of the hospital amendments. The unfair labor practice herein consisted of efforts to enforce the union security clause in a collective agreement which clearly transgressed the mandate of Section 9(b)(1). As the Board noted, this unfair labor practice activity took place after the Board has exclusive jurisdiction (A. 16). Accordingly, the Board resolved the unit issue upon which the enforceability of the union security clause depended in accordance with the requirements of the National Labor Relations Act.

The language of the health care amendments and the legislative history support the result reached by the Board here, for both suggest that the Board was not to countenance contractual arrangements that are contrary to the Act's requirements simply because they were entered into prior to the amendments. The legislation itself (Section 4) does nothing more than provide that the amendments were to become effective 30

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[11] Although the Board will not invalidate as inappropriate a unit which combines professional and nonprofessional employees without a self-determination election where the unit was voluntarily created by the parties and maintained by them for many years without challenge (*Vincent Drugs, supra,* 144 NLRB at 1251-1252), such conditions are absent here. The unit herein was not amended to include the dieticians until July 1974 and has been marked by a continuing lack of consent to inclusion by the dieticians as illustrated by their continuing refusal to comply with the union security provisions of the collective bargaining agreement (D&O p. 7).

days after their enactment. It lacks provisions for transitional collective bargaining in pre-existing units such as contained in the Postal Reorganization Act which gave the Board jurisdiction over postal workers. See, Public Law 91-375 (84 Stat. 719, 39 U.S.C., Sec. 101, 1203(b)). The legislative history also shows that upon the effective date of the amendments parties would be expected to comply with the Act's requirements. Thus, in answer to a question from Representative Quie, Representative Thompson stated:

> To attempt to answer your question, it seems that those hospitals presently engaged in bargaining will have to meet the requirements of the National Labor Relations Act when this legislation becomes effective. For instance, had a hospital recognized a minority union, it is contemplated that the hospital could no longer continue recognition. It would seem the better practice that if either party questioned the validity of the recognition or the appropriate unit, they should file a representation petition with the NLRB.

120 Cong. Rec. 6393 (Daily Edition, July 11, 1974). Later, in this colloquy with Representative Quie, Representative Thompson indicated that contracts in effect at the time of the extension of the Act's coverage which were contrary to the Act's requirements such as contracts containing an illegal union security clause would not serve as a bar to representation petitions. 120 Cong. Rec. 6393 (Daily Edition, July 11, 1974). While Representative Thompson went on to say that pre-amendment contracts covering units which the Board might not approve in the first instance would nevertheless serve as a bar to representation petitions, Representative Thompson was obviously referring to units which the Board, in the exercise of its discretionary authority, might not have approved, as opposed to units

such as the one involved here which the Board is forbidden to establish under the specific mandate of Section 9(b)(1). 120 Cong. Rec. 6393 (Daily Edition, July 11, 1974). Hence, the Board properly viewed the extension of the Act's coverage to private, non-profit hospitals as requiring it to apply the Act's policies to the instant situation.

This conclusion is not altered by the phraseology "appropriate when made" in the proviso to Section 8(a)(3). It is apparent that in framing this proviso to Section 8(a)(3) Congress contemplated the normal situation where the Act governed the contract from its inception. Moreover, the proviso to Section 8(a)(3) indicates that a union security agreement is permissible only where the collective bargaining relationship conforms to the provisions of the National Labor Relations Act. As the proviso expressly requires that the union "be the representative of the employees as provided in Section 9(a)", it follows that the further requirement that there be an "appropriate collective bargaining unit" covered by the "agreement when made" should be construed as validating only agreements which conformed to the provisions of the National Labor Relations Act when made. Hence, when the proviso of Section 8(a)(3) is read in its entirety and in relation to the intention of Congress to extend the Act's protection to employees of a private, non-profit health care institutions, it is clear that the Board acted properly in evaluating the unit question presented by the unfair labor practice in terms of the requirements of the National Labor Relations Act. The Board's decision results in a uniform application of Section 9(b)(1) to health care institutions. Were the Board to treat enforcement of the union security clause as privileged, the Board would in effect be treating as its own and establishing as appropriate under the Act a unit which is in direct conflict with a specific provision of that Act, and as to which the employees in question have continuously maintained an objection.

Finally, the Board properly rejected the contention that it would defer to the arbitrator's ruling, based on the state law, that the union security agreement was enforceable. It is well settled that the Board's authority to decide unit questions under Section 9 of the Act cannot be usurped by the arbitral process. In *Carey v. Westinghouse*, 375 U.S. 261, 272 (1964), the Supreme Court acknowledged the Board's "superior authority" over the arbitral process to determine whether "the employees involved in the controversery are members of one bargaining unit or another" and declared that "the Board's ruling would, of course, take precedence." See *Sheraton-Kauai Corp. v. N.L.R.B.*, 429 F.2d 1352, 1357 (C.A. 9, 1970). ("[N]either the Board's discretion under Section 9(b), nor the employees' right of self-determination under Section 7 can be limited by contract between a union and employer"). Thus, in accordance with its statutory duty under Section 9(b) of the Act, the Board has consistently refused to defer to the arbitral process where the issue concerned unit questions. *N.L.R.B. v. Horn & Hardart Co.*, 439 F.2d 674, 678-681 (C.A. 2, 1971); *Bakery and Confectionary Workers' International Union of America, Chocolate Workers No. 464*, 208 NLRB 452, 456-458 (1974), enforced, 506 F.2d 1052 (C.A. 3, 1974); *Germantown Development Co., Inc.*, 207 NLRB 586, 587 (1973); *Combustion Engineering Inc.*, 195 NLRB 909 (1972). Accordingly, the arbitrator's findings were not binding on the Board.

CONCLUSION

For the foregoing reasons, we respectfully request that a judgment be entered enforcing the Board's order in full.

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July 1976.

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CERTIFICATE OF SERVICE

The undersigned certifies that three (3) copies of the Board's offset printed brief in the above-captioned case have this day been served by first class mail upon the following counsel at the addresses listed below:

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NATIONAL LABOR RELATIONS BOARD

Dated at Washington, D. C.

this 9th day of July, 1976.